

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SECOND APPEAL No. 188 of 1987****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG**

=====

1 Whether Reporters of Local Papers may be allowed  
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy  
of the judgment ?

4 Whether this case involves a substantial question  
of law as to the interpretation of the  
constitution of India, 1950 or any order made  
thereunder ?

5 Whether it is to be circulated to the civil judge  
?

=====

**BHANJIBHAI NATHUBHAI MAKWANA - Appellant(s)****Versus****RAJKOT JILLA PANCHAYAT - Defendant(s)**

=====

**Appearance :**

MRS SANGITA PAHVA for Appellant(s) : 1,

MR ND NANAVATI for Defendant(s) : 1,

=====

**CORAM : HONOURABLE MR.JUSTICE R.S.GARG****Date : 27/09/2006****ORAL JUDGMENT**

1.The plaintiff, who has lost in both the Courts  
below, is before this Court with the submission  
that the learned trial Court recorded every  
finding in his favour, but dismissed the suit on

the ground of limitation and when an appeal has been taken before the appellate Court, the appellate Court held that the suit is within limitation but the appellate Court set aside other findings and held that the plaintiff is not entitled to any decree.

2. The Second Appeal has been admitted for hearing on the following substantial questions of law.

“(1) Whether in the facts and on the circumstances of the case, the Lower Appellate Court has erred in reversing the judgment of the Trial Court which was in favour of the appellant, on the point of dismissal without there being any cross appeal on that issue by the respondent-original defendant ?

(2) Whether in the facts and on the circumstances of the case, the Lower Appellate Court erred in holding that the order of dismissal dated 11<sup>th</sup> October, 1982 (Exh.31) is justifiable in the eyes of law and also in consonance with Rule 10 of the Gujarat Panchayat Service

(Discipline & Appeal) Rules, 1961 ?”

3. Mrs. Pahva, learned counsel for the appellant, submits that present is a case where in absence of any appeal or cross objection at the instance of the respondent, the appellate Court could not interfere with the findings recorded in favour of the appellant. She also submits that present is not a case where powers conferred upon the appellate Court under Rule 33 of Order 41 should be exercised against the interest of the appellant. She also submits that the order of dismissal dated 11<sup>th</sup> October, 1982 (Exh.31) is not justifiable and is not in consonance with Rule 10 of the Gujarat Panchayats Service (Discipline & Appeal) Rules, 1961. She has also relied upon the judgment of the Supreme Court in the matter of *Chaudhary Sahu (Dead) by Lrs. vs. State of Bihar*, AIR 1982 SC 98.

4. The judgment of the Supreme Court in fact holds against the interest of the appellant when it reads that, “On the strength of the first part of sub-cl. (1) of R. 22 of O. 41 the State of Bihar could only support the decree not only on

the grounds decided in its favour, but also on the grounds decided against it."

5. A person would be entitled to take Cross Objection where some relief claimed by him has been refused or some relief has been granted against him. In a case of dismissal of the suit, the defendant would have no right to file Cross Objection because he does not suffer a decree and if he does not suffer a decree, then he cannot file an appeal because against the finding, one cannot prefer an appeal.

6. Rule 22 provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree, but may also state that the findings against him in the Court below in respect of any issue ought to have been in his favour. Rule 22 further provides that respondent, who has not filed an appeal, may also take any cross objection which he could take by way of an appeal. In the present case, as the respondent had no right to prefer an appeal, they had no right to file cross objection and even otherwise cross

objection against the findings would not be maintainable, but the defendant-respondent would always be entitled to support the decree on the grounds which were otherwise decided against his interest.

7. Rule 33 of Order 41 applies altogether to a different situation because it gives powers to the appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. Assuming in a given case, a set of the plaintiffs files a suit for partition against number of defendants, the suit is ultimately decreed and some of the defendants only take up an appeal, if the appellate Court comes to the conclusion that the decree passed by the trial Court is absolutely illegal, then while setting aside the decree in favour of the appellants before it, it would set aside the decree which had been made against unappealing defendants because in case, such an order is not passed by the appellate Court, it would become a case of

inconsistent decree. In such a case, some of the defendants would be answerable to the partition and some of the defendants would not be answerable to the partition. To meet such a situation and contingency, powers under Rule 33 are to be exercised.

8. So far as the second question is concerned, the learned first appellate Court has given cogent reasons to hold that the order of dismissal dated 11<sup>th</sup> October, 1982 is justified on the facts.

9. Both the questions are answered against the plaintiff-appellant. The appeal is dismissed. No costs. Let a decree be framed accordingly.

( **R.S. GARG, J.**  )

\*mithabhai